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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

DANIEL SMALL, CAROLYN SMALL,
WILLIAM CURTIN, DAVID COHEN,
LANETTE LAWRENCE, AND LOUISE
COLLARD, Individually, and on Behalf of
All Other Persons Similarly Situated,

Plaintiffs,

v.

UNIVERSITY MEDICAL CENTER OF
SOUTHERN NEVADA, a political
subdivision of Clark County, State of Nevada,
CLARK COUNTY, a political subdivision of
the State of Nevada, and JOHN ESPINOZA,
an individual,

Defendant.

CASE NO. 13-cv-00298 APG-PAL

**PLAINTIFFS' REVISED APPLICATION
FOR COSTS AND ATTORNEYS' FEES**

I. INTRODUCTION

Plaintiffs Daniel Small, Carolyn Small, William Curtin, David Cohen, Lanette Lawrence, and Louise Collard (“Plaintiffs”), respectfully submit this Revised Application for Costs and Attorneys’ Fees (“Application”) in accordance with this Court’s July 31, 2018 Order (“Order”). Plaintiffs’ Application is supported by the declarations of counsel, establishing the amount of attorney’s fees and costs incurred as a result of defendant University Medical Center of Southern Nevada’s (“Defendant” or “UMC”) evidence destruction and “failing to identify, preserve, collect, process, and search multiple repositories of information relevant to the parties’ claims and defenses.” Order at p. 64. In its *de novo* review of the Special Master proceedings, this Court found that “UMC made additional misrepresentations to the court and opposing counsel about its ESI capabilities that the special master did not catch.” Order at 98.

In summary, and in support of this Application, this court concluded:

UMC has repeatedly violated its discovery obligations and its duty to preserve. Its multiple failures to implement timely preservation procedures, and to identify and collect information from relevant responsive repositories, resulted in the destruction of ESI responsive to plaintiffs’ discovery requests. It also resulted in considerable delay of discovery, consumed an extraordinary amount of judicial resources, and cost the parties enormous, unnecessary time and expense. Sanctions are warranted.

Order at 5.

This Court defined the parameters of the monetary sanctions as:

reasonable costs and attorneys’ fees unnecessarily incurred by plaintiffs, including costs incurred for plaintiffs’ ESI consultants in connection with (1) filing the May 2013 motion to compel; (2) efforts to obtain compliance with the order compelling UMC to produce information responsive to the discovery requests in dispute; (3) attempts to identify and remedy UMC’s deficient ESI productions; and (4) cost of participating in special master proceedings.

Order at 122.

1 In light of this Court's above-quoted guidance, Plaintiffs' Counsel seek reimbursement of
2 \$1,725,643 in attorney fees and \$324,548.33 in expenses reasonably incurred in dealing with
3 Plaintiffs' motion to compel discovery and the Special Master proceedings in this case.

4 **II. FACTS**

5 As noted above, On July 31, 2018, this Court issued its Order concerning the Report and
6 Recommendation and Final Findings of Fact and Conclusions of Law of Special Master Daniel
7 B. Garrie. The following, along with the details described in the attached counsel declarations
8 and exhibits, constitute Plaintiffs' Application Requesting Costs And Attorneys' Fees.
9

10 The costs and attorneys' fees incurred by Plaintiffs, their experts, and consultants in the
11 Special Master proceedings and in attempting to obtain compliance by UMC with its ESI
12 obligations includes: (1) briefing one motion to compel with accompanying oral argument; (2)
13 seven discovery status conferences before the Court between May, 2013 and March 2014; (3) the
14 research and appointment of Special Master Daniel B. Garrie; (4) five all day, in-person hearings
15 before the Special Master; (5) fourteen telephonic hearings before the Special Master; (6) review
16 and analysis throughout the Special Master proceedings of huge volumes of data and data
17 summaries, numerous declarations, supplemental declarations and hearing testimony, and
18 countless written submissions by counsel and ESI experts; and (7) dozens of meet and confer
19 discussions and conferences with, at varying times, co-counsel, defense counsel, ESI experts
20 and the Special Master. It is indisputable that the fees and costs requested in this Application
21 were all incurred pursuant to orders by this Court and the Special Master.
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24 The upshot of all the extra work is the findings of the Special Master, and confirmed by
25 this Court, that "UMC destroyed evidence," that "UMC's executives and personnel made
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1 numerous misrepresentations to UMC's counsel, the Court, and Special Master" that needlessly
2 delayed this action and drove up the cost and expenses. Docket Entry 189.

3 Not surprisingly, the Special Master expressed his "serious doubts" that UMC would or
4 even could "complete discovery in a defensible manner" at all. [*Id.*] Likewise, as previously
5 noted by this Court, UMC's behavior and strategy, or lack thereof, concerning the production of
6 ESI in this action has been "absolutely ridiculous" and a "fiasco." *See* Docket Entry #144, page
7 20 (Transcript of Proceedings for Status Conference held on January 21, 2014).

8
9 This action was initiated on July 27, 2012, and involves a Complaint for violations of
10 federal wage laws by UMC for automatically deducting thirty (30) minutes each day from its
11 hourly employees' pay for meal break times. Docket Entry ##1, 37. These automatic deductions
12 were made by Defendant during the relevant time period irrespective of whether or not UMC's
13 hourly employees were able to take the breaks at issue. Consequently, as Defendant John
14 Espinoza revealed in a letter to the Department of Labor, "documentation to support an
15 uninterrupted lunch period does not exist in most cases." Order at 102. Moreover, at the time
16 Plaintiffs' initial Complaint was filed, Defendants had no written or uniform procedure in place
17 to track whether or not employees actually were taking a thirty minute uninterrupted meal break.
18 Dkt. No. 273-7 at p. 59.

19
20 From the outset, Plaintiffs and their counsel diligently prosecuted this action. Also from
21 the outset, Plaintiffs and their counsel recognized the voluminous and sensitive nature of the
22 electronic information regarding emails, text messages, memos, files, payroll data, timesheets,
23 and other potentially relevant documents in Defendant's possession. After initiating this lawsuit,
24 Plaintiffs issued an ESI preservation letter to UMC on August 6, 2012. Then, weeks after
25 Defendant's Motion to Dismiss was denied on November 14, 2012 (Docket Entry #33), and once
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1 the First Amended Complaint was filed on December 13, 2012 (Docket Entry #37), Plaintiffs
2 served an amended ESI preservation letter on UMC. Notwithstanding these preservation letters,
3 and as exhaustively detailed in the Order, Defendant failed to keep and retain much of the
4 relevant data.¹

5 After the conclusion of the Special Master proceedings, in an October 2014 hearing,
6 defense counsel Robert Freeman openly admitted his client's mistakes and ongoing discovery
7 failures had resulted in an estimated "2 million dollar endeavor" for the hospital so far. This
8 dollar figure, which this Court advised UMC it could and should have taken pains to avoid, puts
9 in context Plaintiffs requested fee and expense application of \$2,050,191.33. Just as UMC was
10 pouring in substantial time and expenses in this matter, so was Plaintiffs' counsel. Indeed,
11 Plaintiffs' counsels requested fees and expenses is close to the \$2 million dollar tab quoted by
12 defense counsel.
13

14 And, as the Court is aware, some of these same issues persist. For example, a UMC
15 Human Resources Analyst testified at a recent deposition that she had not even been asked to
16 produce hundreds of pages of additional highly-relevant, handwritten notes taken in UMC
17 committee meetings that directly addressed the Fair Labor Standards Act.²
18

19 **III. PLAINTIFFS' COUNSELS' TIME IS REASONABLE**

20 In seeking reimbursement for their reasonable time and expenses, including costs
21 incurred by Plaintiffs' ESI consultants, Plaintiffs' Counsel itemize their time and expense as
22 follows:: (1) time and expense related to Plaintiffs' May 2013 motion to compel; (2) time and
23

24
25 ¹ Since the Order provides an exhaustively detailed analysis of the litigation history leading up to
26 the appointment of the Special Master proceedings as well as the Special Master proceedings
27 itself, Plaintiffs will not repeat that history here.

² See Ex. 5 to the Godino Declaration (7/3/18 Deposition Transcript of Leah Conedy), at pp.20
1.14-p.21 l. 14.

1 expense related to efforts to obtain compliance with the order compelling UMC to produce
2 information responsive to the discovery requests in dispute (including the lengthy discovery and
3 dispute resolution hearings conducted between August 15, 2013, and February 11, 2014; (3) time
4 and expense relating to attempts to identify and remedy UMC's deficient ESI productions; and
5 (4) time and expense of participating in special master proceedings.

6 In order for this Court to determine the reasonableness of the work performed by
7 Plaintiffs' counsel regarding the above-described four categories, Plaintiffs' Counsel have
8 attached to their declarations, detailed time records that provide a reasonable description of the
9 work performed relating to the four categories. *See* Exhibit 2 to the Godino Declaration, Exhibit
10 B to the Tostrud Declaration, and Exhibit 1 to the O'Mara Declaration.

12 Plaintiffs' counsel are working this case on a contingency fee basis. Plaintiffs'
13 Counsels' hourly rates, which range from \$350 for associates to \$750 for senior attorneys are
14 reasonable. Counsel are entitled to their requested hourly rates if those rates are within the
15 range of rates charged by and awarded to attorneys of comparable experience, reputation, and
16 ability for similar work, *i.e.*, complex class action litigation. *Children's Hospital and Med.*
17 *Center v. Bonta*, 97 Cal. 4th 740, 783 (2002) (affirming that rates were "within the range of
18 reasonable rates charged by, judicially awarded to, comparable attorneys for comparable
19 work"). "Courts may find hourly rates reasonable based on evidence of other courts approving
20 similar rates or other attorneys engaged in similar litigation charging similar rates." *Parkinson*
21 *v. Hyundai Motor Am.*, 796 F.Supp.2d 1160, 1172 (C.D. Cal. 2010).

23 Here, Plaintiffs' Counsels' rates have been approved by multiple other courts (*see e.g.*
24 Godino Declaration, ¶12, Tostrud Declaration, ¶12, O'Mara Declaration, ¶12), and are
25 consistent with other attorneys engaged in similar complex litigation. *See In re High-Tech*
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1 *Employee Antitrust Litigation*, 2015 WL 5158730, at *9 (N.D. Cal. 2015) (finding reasonable
2 “billing rates for partners [that] range from about \$490 to \$975 ... billing rates for non-partner
3 attorneys, including senior counsel, counsel, senior associates, associates, and staff attorneys,
4 [that] range from about \$310 to \$800, with most under \$500 ... [and] billing rates for
5 paralegals, law clerks, and litigation support staff [that] range from about \$190 to \$430, with
6 most in the \$300 range.”); *Kearney v. Hyundai Motor America*, 2013 WL 3287996, at *8 (C.D.
7 Cal. June 28, 2013) (approving hourly rates between \$650 and \$800 for class counsel in a
8 consumer class action); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 2016 WL
9 4126533, at *7 (N.D. Cal. 2016) (“billing rates between \$350 and \$875 are reasonable within
10 this legal market for cases of this size, type, and complexity”).

12 Further, Courts routinely award fees based on evidence that defendant’s detrimental
13 conduct during discovery was willful, deliberate, and/or recklessly negligent. *See Haeger v.*
14 *Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1237 (9th Cir. 2016) (*Haeger*), cert. gtd., in
15 part, *Goodyear Tire v. Haeger*, 137 S. Ct. 30, 195 L. Ed. 2d 902 (2016) (Ninth Circuit court
16 upholds a \$3 million dollar sanctions award for discovery fraud committed in bad faith); *Shawe*
17 *v. Elting*, Case No. 487, 2016 (*Supreme Court of Delaware, Feb. 13, 2017*)(the Delaware
18 Supreme Court found the Court of Chancery followed the correct legal standards and made no
19 errors of law in its sanctions award of over \$7 million against the appellant for discovery
20 misconduct); *Rosenthal Collins Group, LLC v. Trading Technologies International, Inc.*, No.
21 05-C-4088, 2011 WL 722467 (N.D. Ill. Fed. 23, 2011) (Court grants defendant’s default
22 judgment motion and \$1 million in monetary sanctions for plaintiff’s discovery misconduct,
23 including attorneys’ fees and costs); *Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, Nos. 16-
24 3637-cv, 16-3726-cv (2d Cir. Jan. 25, 2018) (Second Circuit court upholds the lower court’s
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1 imposition of a \$2.7 million dollar sanction for discovery abuses); *GN Netcom, Inc. v.*
2 *Plantronics, Inc.*, 2016 WL 3792833 (July 12, 2016) (Court sanctions the defendant for
3 discovery abuses, including an adverse inference jury instruction, monetary sanctions in the form
4 of reasonable fees and costs to the plaintiff, a “punitive” sanction of \$3 million, and possible
5 evidentiary sanctions to be determined before trial).

6 Accordingly, Plaintiffs’ Counsel’s fee request is reasonable.

7 **IV. PLAINTIFFS’ COUNSELS’ EXPENSES ARE REASONABLE**

8
9 Plaintiffs’ Counsel have incurred expenses related to Plaintiffs’ Motion to Compel
10 Discovery and the Special Master Proceedings in the total amount of \$324,548.33. These
11 expenses represent less than 6% of the combined lodestar of Class Counsel. All the expenses
12 were reasonably incurred, and in the case of travel and ESI expert costs, those were incurred as a
13 direct result of directives issued by the Special Master. All expenses are described in the
14 accompanying Plaintiffs’ Counsels’ declarations filed contemporaneously herewith. *See* Godino
15 Declaration ¶¶ 13-16, Tostrud Declaration ¶¶ 13-16, O’Mara Declaration ¶¶ 13-16.

16
17 **V. OTHER RELEVANT FACTORS FOR THE COURT TO CONSIDER**

18 **A. The results obtained and the amount involved**

19 As a result of Plaintiffs’ Counsels’ tireless efforts and enormous costs expended to obtain
20 the discovery necessary to litigate this case, Plaintiffs have achieved significant results. First and
21 foremost, Plaintiffs are finally in possession of sufficient discovery to proceed with summary
22 judgment, and if necessary, trial.

23
24 Second, Counsel vigorously pursued the facts and evidence in this matter and, as a result,
25 significant expense and the commitment of an extraordinary amount of time, obtained an adverse
26 instruction that the jury will weigh in determining the merits of this case. Specifically:

1 UMC is sanctioned in the form of an instruction to the jury that the court has
2 found UMC failed to comply with its legal duty to preserve discoverable
3 information, failed to comply with its discovery obligations, and failed to comply
4 with a number of the court's orders. The instruction will provide that these
5 failures resulted in the loss or destruction of some ESI relevant to the parties'
6 claims and defenses and responsive to plaintiffs' discovery requests, and that the
7 jury may consider these findings with all other evidence in the case for whatever
8 value it deems appropriate.

9 Order at 122.

10 Lastly, Plaintiffs' Counsel can apply for reimbursement for their time and expenses
11 "unnecessarily incurred by plaintiffs, including ESI consultant fees, incurred in connection with
12 filing Plaintiffs' May 2013 motion to compel, attempts to identify and remedy UMC's deficient
13 ESI productions, and the cost of participating in the Special Master proceedings." Order at 5. As
14 detailed in Plaintiffs' Counsels' Declarations, such costs and fees are slightly more than \$2
15 Million.

16 **B. The novelty and difficulty of the questions involved**

17 The novel and difficult questions presented which give rise to this Application are legion
18 and include facts such as: 1) Defendants had no preservation policy or litigation hold policy; 2)
19 Defendants failed to timely comply with two preservation letters that they received; 3)
20 Defendants' deficient ESI productions; 4) Defendants failure to disclose the existence of relevant
21 ESI repositories; 5) Defendants' Failure to comply with this Court's Orders to preserve ESI; 6)
22 Defendants modified, lost, deleted and/or destroyed ESI Responsive to Plaintiffs' Discovery
23 Requests 7) Defendants and its counsel made false representations to this Court and Plaintiffs'
24 counsel regarding several discovery issues, including but not limited to misrepresentations
25 regarding the completeness of its production of documents relating to the Department of Labor
26 investigation. In light of the above, the difficult and novel circumstances presented to Plaintiffs'
27 counsel in obtaining discovery in this case are self-evident and certainly reflected in the Order.

C. The preclusion of other employment by the attorney due to acceptance of the case

As a result of Defendants well-documented discovery abuses, Plaintiffs' Counsel unnecessarily spent an extraordinary amount of additional time attempting to identify and remedy UMC's deficient ESI productions, including, but not limited to the many months participating in the Special Master proceedings. This additional time, which would not have been incurred but for Defendants' discovery abuses, prevented Plaintiffs' counsel from using that time to develop potential cases as well as working on other existing cases. *See* Godino Declaration ¶19, Tostrud Declaration ¶9, O'Mara Declaration ¶18.

D. The experience, reputation, and ability of the attorney(s)

Plaintiffs' Counsel are highly experienced class action practitioners. As detailed in Plaintiffs' Counsels' declarations, Plaintiffs' counsel are more than qualified to represent Plaintiffs in this case. *See* Godino Declaration ¶¶17-18, Ex. 4; Tostrud Declaration ¶17, Ex. C; O'Mara Declaration ¶17, Ex. 2.

E. The undesirability of the case

One undesirable aspect of bringing this case against UMC is the fact that the hospital is a quasi-governmental entity. Plaintiffs' Counsels' past experience dealing with such government entities is the amount of bureaucratic red tape involved in getting approval for various aspects of the litigation. Consequently, cases of this nature generally take longer to litigate than when dealing with private defendants. This issue is especially important since Plaintiffs' Counsel are litigating this case on a contingency fee basis in addition to fronting the costs of the litigation.

F. Professional relationship with client

Counsel was retained by the named plaintiff, Daniel Small, in 2012 and had no prior relationship with Mr. Small. Counsel has experienced a positive and productive working

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PROOF OF SERVICE

I, the undersigned say:

I am not a party to the above case and am over eighteen years old.

On August 14, 2018, I served true and correct copies of the foregoing document, by posting the document electronically to the ECF website of the United States District Court for the District of Nevada, for receipt electronically by the parties listed on the Court's Service List.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 14, 2018.

s/ Marc L. Godino
Marc L. Godino

Mailing Information for a Case 2:13-cv-00298-APG-PAL Small et al v. University Medical Center of Southern Nevada

Electronic Mail Notice List

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